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Supreme Court of the United States

October Term, 1975

No. 75-230

JOE DAMION LOVATO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1975
No. .....

JOE DAMION LOVATO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Joe Damion Lovato, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on July 14, 1975.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed for the convenience of the Court in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

Petitioner was denied due process of law in that the District Court failed to grant an evidentiary hearing to determine if the court was required to divest itself of jurisdiction over the petitioner after petitioner had offered sufficient and credible evidence that he had been illegally and forcibly abducted into the jurisdiction of the court.

Constitutional Provision Involved.

The First Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law. The Fourteenth Amendment to the United States Constitution protects these rights of all citizens from similar actions by state entities.

Statement of the Case.

Petitioner was charged by Indictment No. 5902 CD, filed on April 22, 1970, in the United States District Court Central District of California. There was a total of eight defendants named in the fourteen-count indictment. The petitioner was charged in Count One with violation of 18 U.S.C., Section 371; 21 U.S.C. §331 (g)(2)(3), that petitioner confederated and conspired with others to possess for sale and to sell amphetamine tablets and barbiturate capsules and dangerous drugs in violation of 21 U.S.C., Section 331(g)(2) and Section 331(g)(3); Count Two, violation of 21 U.S.C., Section 176(a), having knowingly received, concealed and facilitated the transportation of marijuana known to have been illegally imported into the United States; Count Three, violation of 21 U.S.C., Section 176(a), having sold marijuana known to have been

illegally imported into the United States; Count Four, violation of 26 U.S.C., Section 4742(a), having transferred marijuana to an agent of the FBI without obtaining a written order issued by the Secretary of the Treasury; Count Five, violation of 21 U.S.C., Section 174, having conspired to receive, conceal, transport and sell heroin; Count Six, violation of 21 U.S.C., Section 174, having received, concealed and transported heroin known to have been illegally imported into the United States; Count Seven, violation of 21 U.S.C., Section 174, having sold heroin to an agent of the FBI; Count Eight, violation of 21 U.S.C., Section 4705(a), having sold, exchanged and given away heroin to an assistant of the FBI without a written order issued by the Secretary of the Treasury; Count Nine, violation of 21 U.S.C., Section 174, having received, concealed and facilitated the transportation of heroin; Count Ten, violation of 21 U.S.C., Section 174, having sold heroin to an assistant of the FBI; Count Eleven, violation of 26 U.S.C., Section 4705(a), having sold, exchanged heroin to an assistant of the FBI without a proper written order; Count Twelve, violation of 21 U.S.C., Section 174, having received, concealed, transported heroin; Count Thirteen, violation of 21 U.S.C., Section 174, having sold heroin to an undercover agent of FBI and DD; Count Fourteen, violation of 26 U.S.C., Section 4705(a), having sold heroin to an undercover assistant of the FBI.

On May 3, 1974, petitioner was arraigned and pleaded not guilty to all counts. Jury trial was set for June 25, 1974.

On June 6, 1974, petitioner's motion to set bail was heard and granted. Bail was reduced to $50,000.00 cor-

porate surety on the condition that the petitioner not leave the County of Los Angeles.

On June 10, 1974, the Government presented a motion for change of petitioner's conditions for release. Court ordered the motion denied.

On June 18, 1974, the court held a motion by attorney Ron Minkin to substitute in as attorney for the petitioner and for continuation of trial. The motion for substitution was granted and trial was continued to August 13, 1974. Condition of bond on the petitioner remained the same.

On July 30, 1974, petitioner filed a notice of motion to dismiss indictment for lack of jurisdiction, supported by memorandum of points and authorities, and affidavits of petitioner, Joe Lovato, and his attorney, Ron Minkin. On August 7, 1974, the Government filed an opposition to petitioner's motion for orders to dismiss indictment for lack of jurisdiction.

On August 13, 1974, petitioner's attorney, Ron Minkin, presented a motion to have an evidentiary hearing on petitioner's motion for order to dismiss indictment for lack of jurisdiction. The court ordered the hearing of the motion continued to August 15, 1974. Jury and one alternate was impaneled and sworn. Court ordered continuance of jury trial to August 16, 1974.

On August 15, 1974, hearing of petitioner's motion for order to dismiss was continued to August 16, 1974.

On August 16, 1974, the court heard petitioner's attorney for a motion for evidentiary hearing regarding motion to dismiss indictment for lack of jurisdiction. Motion was denied without prejudice.

On August 19, 1974, trial by jury began. Petitioner requested waiver of trial by jury and waiver of jury was granted.

On August 20, 1974, petitioner pleaded guilty to Counts V and X of the Indictment. Court found the petitioner guilty of Counts V and X. Probation and sentence hearing was set for September 23, 1974.

On September 23, 1974, petitioner's counsel renewed motion to dismiss and a motion for mistrial as to counts 6, 7, 8, 9, 11, 12, 13 and 14. Motion was granted Court ordered petitioner committed to the custody of the United States Attorney General for a period of five years as to Count 5 and five years as to Count 10, to run concurrently with each other. Bond on appeal was set in the amount of $50,000.00 corporate surety on the condition that petitioner not leave the jurisdiction of the United States District Court, for the Central District of California, and petitioner is to report to his attorney every other Monday morning. On motion of the United States Attorney, Counts 1, 2, 3 and 4 were ordered dismissed as to the petitioner.

On September 23, 1974, the petitioner, through his attorney, filed a Notice of Appeal.

On July 14, 1975 the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court.

Statement of Facts.

On July 30, 1974, petitioner through his attorney, Ron Minkin, filed a notice of motion to dismiss indictment for lack of jurisdiction. On August 13, 1974, petitioner's attorney moved the court to grant an evidentiary hearing on petitioner's motion.

In petitioner's affidavit for such motion, hereinafter quoted in total, the following allegations were made:

"AFFIDAVIT/DECLARATION
OF JOE DAMION LOVATO

State of California, County of Los Angeles—ss.

"I, JOE DAMION LOVATO, being first duly sworn, under penalty of perjury, depose and say:

"I am a natural born citizen of the United States of America.

"That I was residing in Guadalajara, Jalisco, Republic of Mexico on January 30, 1974.

"On January 30, 1974, I was taken into custody by officers and enlisted men of the Republic of Mexico, Department of the Army and I believe a member of the American Consulate in Guadalajara was also present. I was taken from Guadalajara on January 30, 1974, to a military facility ten or fifteen minutes outside of Guadalajara. I was blindfolded, so that my vision was impaired and I was handcuffed by agents of the Mexican Government. At the first military facility that I was detained, I was handcuffed, my eyes remained bandaged and I was forced to keep my head lowered at all times. Before my eyes were covered, I observed the vehicle in which I was forcibly confined in being followed by a Ford Mustang automobile that followed us until the four Mexican nationals covered my eyes. From my familiarity with Guadalajara, I believe that I was transferred from the first military facility to a military airfield that is controlled by the Fourth Regiment or Division of the Mexican Military Air Service. At the airfield, I was kept confined in a small room, was

not given any food or medical treatment and was in the next morning placed in a vehicle that was followed by an American Government car for four or five hours. At 2:00 p.m., in the afternoon of the second day, approximately January 31, 1974, I again observed the 1973 Ford Mustang continue to follow the vehicle in which I was forcibly being transported north toward the United States border. During my period of forcible detention by officials of the Mexican Government, I was never advised of any violations of law that I was accused of committing while in Mexico. The only thing that I was told was that they had been requested by American officials to arrest me and transfer me to the American border where I would be turned over to American authorities because the American authorities had been looking for me for a long time. During the time that it took to travel from the military airfield to the American border, the Mexican authorities who identified themselves to me by badges, but not by names, made several telephone calls, they said, to the people who had requested my arrest that were paying for my return to the United States. I was forcibly transferred by the Mexican authorities to Nuevo Laredo and the Mexican authorities in whose custody I was in advised the Mexican border authorities that they had an American prisoner whom they were going to deliver to the American authorities in Laredo, Texas. At the Nuevo Laredo border station, Nuevo Laredo, Mexico, in the State of Tamaulipas, I again saw the Ford Mustang automobile blinking its lights in a signal fashion and I was removed from the Mexican Government ve-

hicle at Nuevo Laredo on February 1, 1974, at or about 3:00 a.m. I was forced to sign some documents with the Mexican authorities and told by the Mexican authorities to sign them or else! I was not permitted to read the papers, nor was I physically capable of reading the papers in that the material used to bind my face and eyes had impaired my vision and I could only observe certain matters, but I was unable to read. After being forced to sign these papers, the Mexican Government officials disarmed themselves, put me back into the Mexican Government vehicle and drove to the American border station at Laredo, Texas. At that time my captors showed their badges of identification to American customs officers and we were directed to pull over to where MR. LEO ARMIJO of the Federal Bureau of Investigation was waiting and upon being turned over to MR. ARMIJO, MR. ARMIJO told me that he had been looking for me for a long time; that I was wanted in San Diego and Los Angeles. MR. ARMIJO read my rights, and there were two other Americans present and I was told that I had a brother in Mexico, LEO LOVATO, and if I tell them where he could be located, so that they could get him, they would tell the judge to go easy on me. I was held in Laredo, Texas for 17 days and in El Rio, Texas; La Tuna, New Mexico, until I was brought to San Diego on or about March 11, 1974. I asked for medical treatment in Laredo, Texas, and was treated at the hospital in Laredo, Texas.

"From the beginning of my capture in Guadalajara, by agents of the Mexican and United States Governments, attempts were made to intimidate me

psychologically and I was subjected to extreme mental and physical torture. I was denied food, drink and access to toilet facilities; I was not allowed to relieve my bowels or bladder; the bandages that were used to blindfold me caused a bleeding reaction, which necessitated receiving medical attention in Laredo, Texas; I was handcuffed continuously until being turned over the American authorities in Laredo, Texas. At times while I was held prisoner in Mexican military establishments, I was bound and suspended from rods thrust through my arms, which were handcuffed to the rear of me. I was told that I would be taken to the United States border, dead or alive, that it did not make any difference to them, as the Mexican-American officials advised me that they were being paid to get me to the border one way or the other and that any attempt to escape would result in my death.

"The following named persons are all residents of Guadalajara, Mexico, and are witnesses to the events herein described and can verify my declaration and affidavit.

1. JOSE ROMERO
2. ROGELIO GARCIA
3. RAFAEL OCHOA
4. JUAN ALFERES
5. FIDEL ALFERES

"I had been living a peaceful, law-abiding life, engaged in the livestock business in the Republic of Mexico since 1970.

"I declare, under penalty of perjury, that the foregoing is true and correct."

REASONS FOR GRANTING THE WRIT.

1. The Petitioner Was Denied Due Process of Law Where He Had Offered Sufficient and Credible Evidence That He Had Been Purposely and Physically Mistreated and Illegally and Forcibly Abducted Into the Jurisdiction of the Court and Where the District Court Failed to Grant an Evidentiary Hearing to Determine if the Court Was Required to Divest Itself of Jurisdiction Over the Petitioner.

In the case at bar, prior to trial the petitioner moved the district court for an evidentiary hearing to present his allegations that he had been forcibly and illegally abducted into the territorial jurisdiction of the Court. In support of that motion, the petitioner alleged in an affidavit, that during the course of his abduction from Mexico to the United States, he had been bound and suspended from rods thrust through his arms which were handcuffed behind him; his eyes had been bandaged in such a manner as to impair his vision and to later necessitate medical treatment; he had been denied food, drink, medical treatment and access to toilet facilities. Also included among the allegations was that while he had been kidnapped by enlisted men of the Republic of Mexico, Department of the Army, at one point he noticed the presence of an American Government vehicle and at other times was able to observe the presence of a Ford Mustang automobile. The petitioner also stated that he had been told that United States officials had requested and had paid Mexican authorities for his return to the United States. Included in the affidavit were the names of possible witnesses to the events concerning his forcible abduction. Later the Assistant United States Attorney stipulated, "(t)hat the United States, through the Federal Bureau of In-

vestigation, requested Mexican authorities to locate, arrest and return the defendant to the United States." Record on Appeal, pages 62-3.

Under *Ker v. Illinois*, 119 U.S. 436 (1888) and *Frisbie v. Collins*, 342 U.S. 519 (1952), the Supreme Court has set forth the rule that the manner in which a defendant is brought into the jurisdiction of the court does not affect the court's power to proceed. However, in the recent case of *United States v. Toscanino*, 500 F. 2d 267 (2d Cir. 1974), it was held that in view of the Supreme Court's expanded interpretation of "due process", the "Ker-Frisbie" rule can no longer be construed as applicable to a situation where a defendant was brought into the United States, as a result of outrageous and reprehensible conduct by government agents. See also *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975).

The Court in *Toscanino, supra*, stated that this holding was compelled by the recognition that the Supreme Court decisions since *Ker* and *Frisbie, supra*, have expanded the interpretation of due process from the guarantee of "fair procedure at trial" to the protection against pretrial police misconduct, and thus "unmistakably contradict its pronouncement in *Frisbie, supra*, that "due process of law is satisfied when one present in court is convicted of crime after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[1] Citing *United States v. Russell*, 411 U.S. 423,

[1]The validity of *Ker* is also raised by the following statement in that case: "In fact that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping . . . without any pretense of authority under the treaty or *from the Government of the United States*." *Ker, supra*, at 443. (Emphasis

(This footnote is continued on next page)

430-431, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Silverman v. United States,* 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).

For example, in *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), in reversing the conviction of a defendant based on evidence received by pumping his stomach against his will, Justice Frankfurter stated, "(i)t has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." Although the instant case does not involve a question of an illegal seizure of evidence, is it any less true that due process of law is not heedless of the means by which a defendant is brought to trial? It is well established that the parameters of due process extend beyond its manifestation in the exclusionary rule.

An arrest is said to constitute a seizure of the person in terms of the Fourth Amendment. See *Henry v. United States,* 361 U.S. 98, 100-101, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); *Giordenello v. United States,* 357 U.S. 480, 485-488, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Wong Sun v. United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); Frankel, Concerning Searches and Seizures, 34 Harv. L.Rev. 361 (1921). And the Fourth Amendment contains prohibitions not only as to seizures without prob-

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added.) Under present law, it is well established that even where illegal conduct by a Government official is not specifically authorized, it is the Government who must nevertheless be held responsible for acts of its agents.

able cause but "unreasonable seizures" as well. The policy reasons behind the exclusionary rule are just as compelling in the case of the illegal seizure of evidence as in the illegal seizure of a person by way of an "unreasonable" arrest. In either case, the two-fold obligatory considerations of the court must be to deter excesses of governmental misconduct and to preserve the respect for and integrity of the judicial processes. Although by requiring a court to divest itself of jurisdiction illegally obtained would in effect confer total immunity to criminal prosecution, this result is no different than the practical effect in the majority of cases where the exclusionary rule is applied. As drastic as this remedy may seem, it serves not to expand existing constitutional rights, but to guarantee that the specific dictates of the Constitution are more than empty commands.

In the instant case, the allegation of the petitioner, if proved to be true, constitutes not only an unreasonable seizure of his person, but one in clear violation of due process of law. The petitioner's affidavit stated that during the course of his abduction from Mexico to the United States, he had been bound and suspended from rods thrust through his arms which had been handcuffed behind him; his eyes had been bandaged in such a manner as to impair his vision and which later necessitated medical treatment; he had been denied food, drink, medical treatment and access to toilet facilities. Although perhaps not reaching the magnitude of the governmental misconduct alleged by *Toscanino*, nevertheless the petitioner suffered more than minor irregularities and violations of a citizen's justifiable expectation of fair treatment under the Constitution.

In *United States ex rel. Lujan v. Gengler, supra,* the Second Circuit Court of Appeals, in further clarifying its decision is *Toscanino, supra,* as being applicable to situations involving violations of due process, refused to grant relief to a defendant who alleged "no deprivation greater than that which he would have endured through lawful extradition." *supra* at 1205. Assuming the *Lujan* holding to be the correct statement of the law, the facts alleged in the instant case come more under the holding of *Toscanino* than *Lujan, supra.* In *Lujan* the defendant's charges were apparently devoid of any allegations of physical or psychological abuses upon the defendant. On the other hand, in the present case, it cannot seriously be contended that the petitioner Lovato had received the same type of treatment he would have had had he been lawfully extradited. It is not to be assumed that denial of food, medical treatment and access to toilet facilities and being suspended from rods are all part of the normal procedures in a lawful extradition or arrest.

The Court of Appeals for the Ninth Circuit in denying the petitioner relief, concluded that his "allegations amount to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien." Whatever may be a correct characterization of Mexican procedures, officials of the United States Government are bound to act within the bounds of the Constitution, whether home or abroad and where the actions of foreign officials were at the instigation of the United States Government, the responsibility of the latter cannot be disclaimed. The mere fact that the United States Government may not have been directly involved in all aspects of the abduction, does not preclude the Government from being held responsible. As stated

in *United States v. Davis,* 482 F.2d 893, 904 (9th Cir. 1973), ". . . even if governmental involvement at some point . . . could be characterized accurately as mere 'encouragement,' or as peripheral, or . . . one of several cooperative forces leading to the (alleged) constitutional violation, see *United States v. Guest,* 383 U.S. 745, 755-756, that involvement would nevertheless be 'significant' for purposes of the Fourth Amendment." See also *Corngold v. United States,* 367 F.2d 1 (9th Cir. 1967); *Byars v. United States,* 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520.

In the instant case, the papers in support of the motion to dismiss alleged facts with sufficient definiteness, clarity and specificity to enable the District Court to conclude that relief must be granted if the facts are alleged to be true. Therefore, the court was in error in denying the petitioner an evidentiary hearing on the matter to determine whether the petitioner's right of due process had been violated and whether he was entitled to relief.

United States v. Carrion, 463 F.2d 704 (9th Cir. 1972);

United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

Conclusion.

In view of the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

RON MINKIN,
Attorney at Law,
Attorney for Petitioner.

APPENDIX A.

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, Appellee, v. Joseph Damion Lovato, Appellant. No. 74-3088.

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

PER CURIAM:

Defendant asserts that Mexican Army personnel, acting in effect as agents of the United States, engaged in misconduct in the course of his expulsion from that country and delivery to the United States officers at the border; he contends that he is entitled to have his prosecution for offenses against the United States terminated under the supervisory power of the courts in order to discourage prosecutorial misconduct. We adhere to our former decisions, and affirm this narcotics conviction.

Lovato relies upon *United States v. Toscanino,* 500 F.2d 267 (2d Cir.), *petition for rehearing en banc denied,* 504 F.2d 1380 (1974). We need not decide whether, if faced with a set of facts like those of *Toscanino,* we might find that decision helpful. The allegations of official participation by United States officers in Lovato's repatriation (by force) from Mexico fall

*The Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California.

within the *Ker-Frisbie* doctrine[1] and an unbroken line of cases in this circuit holding that forcible return to the jurisdiction of the United States constitutes no bar to prosecution once the defendant is found within the United States.[2]

We note further that the Second Circuit, after its decision in *Toscanino,* has refused to extend that holding to a Toscanino codefendant who also claimed that he had been kidnapped by South Americans who were the paid agents of, and directed by, United States government agents. *See United States ex rel. Lujan v. Gengler,* [510 F.2d 62] (2d Cir. 1975). The *Lujan* case makes it clear that even in the light of *Toscanino,* the Second Circuit continues to follow the *Ker-Frisbie* line of cases unless the person claiming that he was kidnapped makes a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States. *Cf. In re Weir,* 495 F.2d 879 (9th Cir.), *cert. denied,* 419 U.S. 1038 (1974).

In the case at bar, when Lovato's affidavit is stripped of its opinions, suspicions, and conclusions, his

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[1]*Ker v. Illinois,* 119 U.S. 436 (1886), and *Frisbie v. Collins,* 342 U.S. 519 (1952), held that the manner of a defendant's entry into the United States did not affect the court's power to proceed.

[2]*United States v. Cotten,* 471 F.2d 744, 748 (9th Cir.), *cert. denied,* 411 U.S. 936 (1973); *United States v. Hamilton,* 460 F.2d 1270 (9th Cir. 1972); *Bacon v. United States,* 449 F.2d 933, 943 (9th Cir. 1971) (a material witness); *Wentz v. United States,* 244 F.2d 172, 176 (9th Cir.), *cert. denied,* 355 U.S. 806 (1957).

allegations amount to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien. Lovato's delivery at the United States border into the hands of officers who were undoubtedly expecting him created no bar to his prosecution.

Affirmed.